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2 **IN THE UNITED STATES DISTRICT COURT**
3 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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7 **JONATHAN MORGAN,**

8 **Plaintiff,**

CV F 05 0620 LJO WMW P

9 **vs.**

**FINDING AND RECOMMENDATION
RE MOTION TO DISMISS (DOC 14)**
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11 **DEPT. OF CORRECTIONS,**

12 **Defendant.**
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15 **Plaintiff is a former state prisoner proceeding pro se and in forma**
16 **pauperis in a civil action against the California Department of**
17 **Corrections. Pending before the court is Defendant's motion to dismiss.**

18 **This action was initiated by civil complaint, setting forth claims**
19 **pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act, 42**
20 **U.S.C. § 12132, et seq. The court directed service of process of the**
21 **complaint upon Defendant California Department of Corrections and**
22 **Rehabilitation (CDCR).**

23 **Defendant CDCR filed a motion to dismiss Plaintiff's claims pursuant**
24 **to 42 U.S.C. 1983. Subsequently, Plaintiff lodged with the court a proposed**
25 **amended complaint. Defendant has not filed any opposition to Plaintiff's**
26 **request. Further, Defendant has responded to the complaint by the filing**

1 of a motion to dismiss. Defendant has not filed an answer to the
2 complaint. Motions under Rule 12 are not responsive pleadings within the
3 meaning of Federal Rule of Civil Procedure 15(a). Plaintiff is therefore
4 entitled to file an amended complaint. Concurrent with this
5 recommendation, an order will be entered, granting Plaintiff leave to file
6 his first amended complaint and directing the Clerk to file the first
7 amended complaint lodged with the court on March 19, 2007.

8 Further, Defendant's motion addressed Plaintiff's claims pursuant to
9 42 U.S.C. § 1983. The first amended complaint proceeds against Defendant
10 on Plaintiff's ADA claim. There are no claims in the first amended
11 complaint pursuant to 42 U.S.C. § 1983.

12 Accordingly, IT IS HEREBY RECOMMENDED that:

13 1. Defendant's motion to dismiss be denied.

14 2. Defendant be directed to file a response to the first amended
15 complaint lodged with the court on March 19, 2007.

16 These findings and recommendations are submitted to the United
17 States District Judge assigned to the case, pursuant to the provisions of
18 Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these
19 findings and recommendations, any party may file written objections with
20 the court and serve a copy on all parties. Such a document should be
21 captioned "Objections to Magistrate Judge's Findings and
22 Recommendations." Any reply to the objections shall be served and filed
23 within ten days after service of the objections. The parties are advised
24 that failure to file objections within the specified time waives all
25 objections to the judge's findings of fact. See Turner v. Duncan, 158 F.3d
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1 449, 455 (9th Cir. 1998). Failure to file objections within the specified time
2 may waive the right to appeal the District Court's order. Martinez v. Ylst,
3 951 F.2d 1153 (9th Cir. 1991).

4 IT IS SO ORDERED.

5 Dated: September 27, 2007

/s/ William M. Wunderlich
UNITED STATES MAGISTRATE JUDGE